

IATJ

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OUTSIIMES

VAT CASE LAW ON DIGITAL BOOKS

- C-219/13 (K Oy), 11.9.2014
- C-479/13 (Comission v. France), 5.3.2015
- C-502/13 (Comission v. Luxembourg),
5.3.2015

C-219/13

- Advance ruling of the Finnish Central Tax Board (KVL 39/2011)
- Preliminary ruling request of the Finnish Supreme Administrative Court (SAC), 22.4.2013 (KHO 2013:77)
- Advocate Generale's Opinion, 14.5.2014
- C-219/13
- Final decision of the SAC, 31.12.2014 (KHO 2014:199)

C-219/13

- K Oy is a publishing company whose activities include the publication of general literature and textbooks. It also publishes audiobooks and e-books.
- E-books published by K Oy are available in the form of electronic files on physical supports such as CDs, CD-ROMs, USB keys or other equivalents.
- An e-book essentially reproduces the content of a book originally available in printed form.
- K Oy applied for an advance ruling from the Central Tax Board to establish whether books published on physical supports other than paper, reproducing the written text of a book in paper format, could be regarded as books within the meaning of point 7 of the first subparagraph of Paragraph 85a of the Law on VAT, sales of which are subject to a reduced rate of VAT.

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- The Central Tax Board ruled that only publications printed in paper form or produced by comparable means could be regarded as books and stated that the first subparagraph of Article 98(2) of the VAT Directive, read in conjunction with point 6 of Annex III to that directive, and the principle of fiscal neutrality did not preclude the application of a standard rate of VAT to sales of books published on a physical support other than paper, rather than the reduced rate applicable to books published in paper form.

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- Based on K Oy's appeal SAC sought the opinion of the Ministry of Finance. In its view, the Member States can apply a reduced rate of VAT selectively to the supplies of goods and services listed in Annex III to the VAT Directive.
- SAC decided to refer the following questions to the Court for a preliminary ruling:
 - '1. Do the first subparagraph of Article 98(2) of and point 6 of Annex III to [the VAT Directive], when the principle of fiscal neutrality is taken into account, preclude national legislation under which a reduced rate of VAT is applied to printed books, but the standard rate is applied to books on other physical supports such as a CD, CD-ROM or USB key?
 - 2. As regards the answer given to the question above, is it of any significance
 - – whether a book is intended to be read or to be listened to (an audiobook),
 - – whether there exists a printed book with the same content as a book or audiobook on a CD, CD-ROM, USB key or other equivalent physical support,
 - – that with a book on a physical support other than paper technical features provided by that support, such as search functions, can be exploited?

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- Opinion Of Advocate General MENGIOZZI:
- The first subparagraph of Article 98(2) of and point 6 of Annex III to the VAT Directive, in the version, as regards the latter, inserted by Directive 2009/47, must be interpreted as not precluding a national law under which a reduced rate of VAT is applied to printed books, whereas books on other physical means of support such as CDs, CD-ROMs and USB keys are subject to the standard rate of VAT, provided that, from the viewpoint of the average consumer of the Member State concerned, the latter are not similar to the former in so far as they do not meet the same needs of that consumer, which is a matter to be ascertained by the referring court.
- This does not vary depending on the three circumstances set out by the referring court in the referred question, namely, first, whether a book is intended to be read or to be listened to (an audio book), secondly, whether there exists a printed book with the same content as a book or audiobook on a CD, CD-ROM, USB key or other similar physical product and, thirdly, whether it is possible to exploit the technical features provided by the physical support other than paper, such as search functions.

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- ECJ stated that it must be recalled that, before the amendment introduced by Directive 2009/47, point 6 of Annex III to the VAT Directive referred to the 'supply ... of books'. Directive 2009/47 amended the wording of point 6 of Annex III to the VAT Directive so that it now includes the 'supply ... of books on all physical means of support' in the list of goods and services capable of benefiting from a reduced rate of VAT.
- Neither the wording of Directive 2009/47 nor the legislative history of that directive indicates that the EU legislature intended, by amending point 6 of Annex III to the VAT Directive, to compel the Member States to apply an identical reduced rate of VAT to all books, whatever the physical support on which they are published.
- It is for the referring court to ascertain, whether books published in paper form and books published on other physical supports are goods which are liable to be regarded by the average consumer as similar. For that purpose, it will have to assess whether those books have similar characteristics and meet the same needs, using the criterion of whether their use is comparable, in order to ascertain whether or not the differences between them have a significant or tangible influence on the average consumer's decision to choose one or other of those books.
- If what matters for that consumer is essentially the similar content of all books, regardless of their physical support or characteristics, the selective application of a reduced rate of VAT is not justified.

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- The ECJ ruled:
- The first subparagraph of Article 98(2) of and point 6 of Annex III to Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended by Council Directive 2009/47/EC of 5 May 2009, must be interpreted as not precluding, provided that the principle of fiscal neutrality inherent in the common system of value added tax is complied with, which is for the referring court to ascertain, national legislation, such as that at issue in the main proceedings, under which books published in paper form are subject to a reduced rate of value added tax and books published on other physical supports such as CDs, CD-ROMs or USB keys are subject to the standard rate of value added tax.

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- SAC decided that books published in paper form and books published on other physical supports are not that much comparable as regards similar characteristics and use that the principle of fiscal neutrality inherent in the common system of VAT would require those equal VAT treatment.
- Hence, the reduced VAT rate is not applicable on books published on CDs, CD-ROMs, USB keys or other equivalents.

C-479/13 and C-
502/13

- Both in France and Luxembourg the supply of electronic books is subject to a reduced rate of VAT. (France 5,5 % and Luxembourg 3 %)
- The Commission has asked the Court to declare that by applying the reduced rate of VAT both Member States have failed to comply the VAT directive.

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- The digital or electronic books at issue include books supplied, for consideration, by download or web streaming, from a website so that they can be viewed on a computer, a smartphone, electronic book readers or other reading system.

C-479/13 and C-
592/13

- ECJ ruled in both cases that by applying a reduced rate of value added tax to the supply of digital or electronic books, the French Republic and the Grand Duchy of Luxembourg have failed to fulfil its obligations under Articles 96 and 98 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax as amended by Council Directive 2010/88/EU of 7 December 2010, read in conjunction with Annexes II and III to that directive and Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC.

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- Point 6 of Annex III to the VAT Directive expressly refers, in the category of services that may be subject to reduced rates of VAT, to the 'supply of books ... on all physical means of support'. It is thus clear from the terms of that point that the reduced VAT rate is applicable to a transaction consisting of the supply of a book on a physical medium.
- Admittedly, in order to be able to read an electronic book, physical support, such as a computer, is required. However such support is not included in the supply of electronic books.
- In the light of the terms of point 6 of Annex III, it follows that that provision does not include in its scope the supply of electronic books.

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- Consequently, since the supply of electronic books is an electronically supplied service within the meaning of the second subparagraph of Article 98(2) of the VAT Directive, and since that provision precludes the possibility of applying a reduced rate of VAT to such services, it is not possible to interpret point 6 of Annex III to the VAT Directive to include within its scope the supply of electronic books without failing to have regard to the EU legislature's intention that a reduced rate of VAT should not apply to those services.

C-479/13 and C-
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- The Court cannot accept the argument that point 6 of Annex III to the VAT Directive must be interpreted as including the supply of electronic books, as it would otherwise disregard the objective of that provision, since digital books are no longer physically delivered to the customer. Suffice it to note in that regard that, as shown by the circumstances at issue in the case giving rise to the judgment in K (EU C:2014:2207), that argument is based on a false premiss.

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- Furthermore, as regards the super-reduced VAT rate (3 %) applied by Luxembourg, the Court recalls that according to the VAT Directive, a Member State may apply reduced VAT rates lower than 5 % provided that, among other things, the reduced rate are in accordance with EU legislation. Since the Court held that the application of a reduced rate of VAT to the supply of electronic books does not comply with the VAT Directive, the requirement that it comply with EU legislation is not met.